

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES E. OVERBY)	
Claimant)	
VS.)	
)	Docket No. 157,645 & 157,646
GENERAL NUTRITION CENTER)	
Respondent)	
AND)	
)	
FIREMAN'S FUND INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

ON the 3rd day of February, 1994, the application of the respondent and insurance carrier for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler dated December 22, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney James W. Humphrey, Jr., of Kansas City, Missouri. Respondent and insurance carrier appeared by their attorney Matthew J. Stretz of Kansas City, Missouri. The Kansas Workers Compensation Fund appeared by its attorney W. Fredrick Zimmerman of Kansas City, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is the same as that listed in the Award of the Administrative Law Judge dated December 22, 1993, in addition to the medical report of Edward J. Prostic, M.D., dated October 27, 1992, that was admitted into evidence at the deposition of Dr. Prostic but which was inadvertently omitted from the transcript.

STIPULATIONS

The Appeals Board hereby adopts those stipulations listed in the Award of the Administrative Law Judge dated December 22, 1993.

ISSUES

The issues addressed in this review are:

- (1) What is the nature and extent of claimant's disability, if any, caused by the alleged accidental injuries of February 2, 1990 and June 4, 1990?
- (2) What is the liability for ongoing medical and chiropractic treatment for the period subsequent to the alleged injuries?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) Claimant has experienced an eight percent (8%) permanent partial impairment of function to the body as a whole for which he is entitled to permanent partial disability benefits as a result of a neck injury that he experienced on or about February 2, 1990, that arose out of and in the course of his employment with the respondent. Claimant has alleged a second, compensable injury on or about June 4, 1990, for which he is entitled to medical benefits only.

Claimant began working for the respondent, General Nutrition Center, on or about September 1, 1988. Respondent sells vitamins, sports apparel, health foods, herbs, and weight lifting equipment. Claimant started work with the respondent as a part-time assistant clerk, and later became manager of respondent's Indian Springs and Metcalf stores located in the Kansas City area.

On or about February 2, 1990, claimant experienced a neck injury while moving weight lifting equipment into one of the stores which he managed. At the time of the incident, claimant experienced symptoms in his upper back and neck. On the day of the incident, claimant advised his immediate supervisor who referred him to Dr. Gieschen, a chiropractor. Claimant saw Dr. Gieschen for approximately six to seven months at respondent's expense. Claimant then sought a second opinion because he seemed to be getting worse. The respondent then allowed claimant to see another chiropractor, Dr. Laune. Claimant began treatment with Dr. Laune in July 1990 and saw him for approximately one year. Claimant then came under the care and treatment of a third

chiropractor, Dr. Anderson, as this doctor was located across the street from claimant's store and claimant felt he was not getting any better while treating with Dr. Laune. Claimant did not miss any work as a result of this accident.

Claimant first saw Dr. Anderson in December 1990 and presently sees him as needed. Dr. Anderson has treated claimant primarily for neck pain and periodically for low back pain.

On or about June 4, 1990, the claimant experienced a second incident at work in which he injured his low back while moving weight lifting equipment into his store. Once again, claimant reported the incident to his immediate supervisor who advised claimant to see his chiropractor. Again, claimant did not miss work as a result of this accident. In approximately June of 1991 claimant's employment with respondent was terminated due to reasons not related to his injuries. Claimant then began working for an automobile dealership and works 50-60 hours per week.

The medical history reveals that prior to February 1990, claimant had been involved in several automobile accidents and that he had received chiropractic treatment to his neck, shoulders and back as a result of an accident in 1980. However, prior to the first alleged work related injury, claimant felt he was in good physical health as he worked out on a regular basis, played golf five or six times a week, played racquetball four or five times a week, and regularly lifted weights and worked out in a gym. One of the reasons claimant was hired was because of his good physical condition.

After the lifting incidents in February and June 1990, the chiropractic records from Dr. Roger L. Anderson indicate that claimant sought treatment on approximately 20 different occasions where he complained of exacerbations of neck and low back problems. Dr. Anderson's records indicate that claimant's exacerbations were caused from a myriad of activities such as, among other things, moving furniture, grounding a boat on a sand bar, moving weights at work, throwing boxes, wrestling with his wife, falling down steps, playing softball, playing golf, and hunting.

At the request of his attorney, claimant was examined by Edward J. Prostic, M.D., on October 27, 1992. Dr. Prostic believes that claimant experienced a cervical disk injury while lifting weights at work and feels he has a permanent partial impairment of function of twelve and one-half percent (12.5%) to the body as a whole and should avoid lifting weights greater than 40 pounds on a single basis and 20 pounds on a repetitive basis; and avoid substantial carrying and using his head in positions away from the neutral. Dr. Prostic believes the twenty-some separate events enumerated in Dr. Anderson's records that occurred subsequent to June 1990 were exacerbations of the original injury at work rather than new injuries. Dr. Prostic did not believe that those subsequent incidents increased claimant's disability.

The claimant was also examined by Dr. Karl Ebelke, M.D., at the request of the respondent and insurance carrier. Claimant made no major complaints regarding pain in the low back and reported only pain in the upper back and neck. After his examination and

review of the medical records from the numerous health care providers from whom claimant had sought treatment, Dr. Ebelke diagnoses claimant as sustaining minor cervical strains. After reviewing claimant's medical records, Dr. Ebelke thought that claimant had been involved in at least two or three motor vehicle accidents which caused neck pain and felt that those accidents are probably more likely to have caused the neck problems than a minor lifting injury that claimant may have sustained at work. Dr. Ebelke reviewed the chiropractic records of Dr. Anderson and categorized the twenty-some post-injury events set forth in Dr. Anderson's records as minor episodes of neck pain and not injuries. Dr. Ebelke feels chiropractic treatment was reasonable for perhaps two or three months after the injuries that occurred in February and June 1990, but there is no way that the treatment provided after that period could be reasonable and necessary as the chiropractic treatment does absolutely nothing with respect to healing the soft tissue, and the only thing the treatments would accomplish would make claimant feel better. Although Dr. Ebelke feels that it is impossible to state whether claimant's current complaints are due either to the previous automobile accidents, the lifting incidents at work, or any of the subsequent events, the doctor feels that the claimant has experienced a four percent (4%) permanent impairment of function to the body based upon the AMA Guides.

Based upon the evidence presented, the Appeals Board finds that claimant has experienced a cervical strain to his neck as a result of his work related accident of February 2, 1990. The Appeals Board finds that claimant was asymptomatic for a number of years during the period between claimant's work related accident on February 2, 1990, and the date of his most recent automobile accident. The credible medical evidence indicates that the numerous events causing exacerbation of symptoms after June 1990 were not new injuries and did not add to claimant's permanent impairment or disability. Based upon the medical evidence, claimant's permanent impairment of function falls within the range of 4 to 12½ percent (4-12½%), and the Appeals Board finds that claimant's impairment is 8 percent (8%) for which he is entitled permanent partial disability benefits as a result of the February 2, 1990 accident. Regarding the June 4, 1990 injury, the Appeals Board finds that claimant experienced a temporary injury to his low back for which he is entitled medical benefits only. Neither Drs. Prostic nor Ebelke found permanent injury to claimant's low back, and neither does the Appeals Board.

Claimant has not argued that he is entitled to work disability in this proceeding and a review of the evidence indicates that he is not. As claimant was physically able to perform his duties with respondent after his work related accidents of February and June 1990, at a comparable wage, there is a presumption that no work disability exists and that presumption has not been overcome. See K.S.A. 44-510e.

(2) A significant issue in this proceeding is respondent's responsibility for ongoing chiropractic treatment. The Administrative Law Judge found that the chiropractic bill incurred with Dr. Laune, who was approved by the respondent, should be ordered paid in the amount of \$565.00. With respect to Dr. Anderson, the Administrative Law Judge found that the balance due him was \$895.60 as of March 30, 1991, and that amount should be paid. The Judge ordered the respondent and insurance carrier were not responsible for the charges of Dr. Anderson incurred after March 30, 1991, due to the subsequent exacerbations and flare-ups caused by claimant's numerous non-work related activities. The Appeals Board is in agreement with the Administrative Law Judge. Future care and treatment for the claimant may be obtained only upon proper application to the Director.

(3) The Appeals Board hereby adopts the findings of Administrative Law Judge Robert H. Foerschler as set forth in his Award of December 22, 1993, that are not inconsistent with the findings and conclusions specifically set forth herein.

AWARD

WHEREFORE, an award of compensation is hereby made in accordance with the above findings in favor of the claimant, James E. Overby, and against the respondent, General Nutrition Center, and the insurance carrier, Fireman's Fund Insurance Company, for an accidental injury sustained on February 2, 1990, as set forth in the Award of Administrative Law Judge Robert H. Foerschler dated December 22, 1993; that the additional orders set forth by Judge Foerschler in his Award are hereby incorporated by reference as if set forth fully herein; that the Award of the Administrative Law Judge is modified only to the extent that the work related incident of June 4, 1990, was temporary in nature and that claimant is not entitled to permanent partial disability benefits related to it.

IT IS SO ORDERED.

Dated this ____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: James W. Humphrey, Jr., 922 Walnut, Suite 900, Kansas City, Missouri 64106
Matthew J. Stretz, 2020 Wyandotte, Kansas City, Missouri 64108
W. Fredrick Zimmerman, P.O. Box 171234, Kansas City, Kansas 66117
Robert H. Foerschler, Administrative Law Judge
George Gomez, Director